United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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no Affidavit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ALFONSO PINEROS,

Defendant-Appellant.

Docket No.
75-1354

On appeal from the United States District Court for the Eastern District of New York

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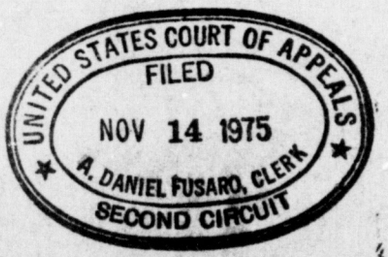
BRIEF FOR THE DEFENDANT-APPELLANT



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- ALFONSO PINEROS, Defendant-Appellant. On appeal from the United States District Court for the Eastern District of New York	Docket No. 75-1354

BRIEF FOR THE APPELLANT

Preliminary Statement

This is an appeal from a judgment of conviction entered in the United States District Court for the Eastern District of New York (Costantino, J.), after a jury trial which convicted the appellant of conspiring with a severed, co-defendant to distribute, and possess with intent to distribute, cocaine between November 21, 1973 and January 10, 1974. Appellant was also convicted of eight substantive violations of Title 18, United States Code, Section 841(a)(1),

possession with intent to distribute and distribution of cocaine, during this same period.

The thrust of the appellant's defense was the issue of his sanity, that is, his lack of substantial capacity to conform his conduct to the requirements of the law, or his lack of substantial capacity to appreciate the wrongfulness of his conduct, at the time of the alleged criminal activity charged.

The appellant is currently incarcerated, as he has been since the day of arrest on January 10, 1974.

Issues Presented for Review

1) Should the Government be permitted to use medical reports not disclosed or made available to the defense in response to Rule 16 motions to impeach the testimony of the defendant's psychiatrist?

2) Is the defense entitled to rely upon the Government's response to pre-trial discovery motions?

3) Was the defendant prejudiced by the action of the Government and the failure of the trial court to correct or otherwise sanction the Government's surprise use of undisclosed medical reports and tests?

Statement of the Case

The appellant was charged with and convicted of a conspiracy with a named, but severed, co-defendant - who had entered a plea of guilty to the conspiracy and to one substantive count - to possess and distribute cocaine from November 21, 1973 to January 10, 1974, and also of various substantive transactions during the tenure of the conspiracy.

Following his arrest on January 10th, and his indictment on January 22nd, 1975, the defendant by Court Order was examined at the Kings County Hospital Center. In his report to the Court, dated January 25, 1973, Dr. Schwartz concluded:

> "On examination at this time the patient is psychotic and as a result unable to understand the proceedings against him or properly assist in his own defense." (Defendant's Exhibit H, made part of the Appendix at 93).

In a subsequent report from the Medical Center for Federal Prisoners at Springfield, Missouri dated April 17, 1974, made pursuant to the Court's Order of February 11, 1974, under 18 U.S.C. §4244, it was reported that:

> "It is the professional staff opinion that the defendant, Alphonso Pineros, is presently mentally ill and not competent to stand trial." (Defendant's Exhibit I, made part of the Appendix at 95).

By Order of the Court, dated July 3, 1974, the defendant was committed to the Springfield, Missouri Medical Center for further psychiatric examination pursuant to 18 U.S.C. §4244. The Center's Associate Director responded on November 18, 1974, concluding that:

> "It is the professional staff opinion that the defendant, Alfonso Pineros, is mentally competent to stand trial." (Defendant's Exhibit J, made a part of the Appendix at 99).

However, Dr. Snow, the Staff Psychiatrist, complained that he had "not received any available data regarding the circumstances which led to this patient's arrest or any investigation material regarding his background." Therefore,

in an attached "Report of Psychiatric Examination," he concluded:

> "It is thus impossible to offer any definitive professional judgment regarding the patient's mental condition." (Defendant's Exhibit J, made part of the Appendix at 101).

By Order of the Court dated February 6, 1975, the defendant was once again examined pursuant to 18 U.S.C. §4244 by the Kings County Hospital Center. On February 19, 1975, Dr. Schwartz, in his report to the Court, concluded that the defendant was "not presently insane or otherwise mentally incompetent so as to be unable to understand the proceedings against him or to properly assist in his own defense." His diagnosis was "unspecified personality disorder." (Defendant's Exhibit K, made part of the Appendix at 109).

After a hearing, the Court found the defendant competent to stand trial on March 14, 1975.

After that, the Government and defense counsel made informal, reciprocal demands pursuant to Rule 16 (a) and (c) (new Rule 16(a) (1) (D) and (b) (1) (B)) of the Federal Rules of Criminal Procedure to inspect and copy all reports

and results of physical or mental examinations of the defendant or copies thereof within the possession, control or custody of the other. (Appendix at 83-86). As a result of such demands, the Government supplied defense counsel with the January 25, 1974 and February 19, 1975 reports from Kings County Hospital Center, the April 17 and November 18, 1974 reports from the Medical Center for Federal Prisoners in Springfield, Missouri and a report from Dr. David Abrahamsen. The defense provided the Government with reports from a Colombian Neurosurgeon (Defendant's Exhibit F, made part of the Appendix at 87), from the Colombian Ministry of Justice, Institute of Forensic Medicine (Defendant's Exhibit G, made part of the Appendix at 91), and a report from Dr. Mario I. Rendon (Defendant's Exhibit L, made part of the Appendix at 114).

The case was called to trial on July 28, 1975, after defendant's motion to suppress certain tape recorded conversations was denied.

With the conclusion of the testimony of two Drug Enforcement Administration Special Agents, the Government rested its case against the defendant.

The defendant then took the stand as a witness on

his own behalf. Defense counsel questioned the defendant as to a serious automobile accident in mid-1971 in which he received a cerebral concussion and a fractured cranium with resulting hemorrhage in the brain. The defense then offered a report of this accident and the resulting injuries by a Colombian Neurosurgeon into evidence. The Government stipulated "as to its authenticity but not its contents." The Court replied, "All right, without conceding the truth of it." (Transcript of July 29, 1975 at 279-280).

Counsel then began to read this document, now in evidence, to the jury. (Defendant's Exhibit F, made part of the Appendix). Mid-way through, the Government asked for a voir dire on the document. The Court replied, "... I don't know who you are going to ask on the voir dire. If you ask me I don't even know what the paper is." (Id. at 282-283).

After completing the reading of the Neurosurgeon's report to the jury, defense counsel asked the defendant to "indicate for us what you did upon being discharged from this hospital." The defendant replied, through an interpretor, that his wife took him home and told him what the doctors had told her about his mental condition. The Court then interjected:

> "Just a minute. This is totally inadmissible. Disregard that statement of what his wife told him. That is inadmissible and not proper and I can't permit improper material to go before the jury. Come over to side bar." (Id. at 285-289).

Dr. Mario I. Rendon, a Colombian psychiatrist, licensed by the State of New York, a full-time attending psychiatrist at Bellevue Hospital and a clinical assistant professor of psychiatry at New York University Medical School, took the stand as a witness on behalf of the defendant. He testified to having examined the defendant and reviewing all the medical reports which the Government and defense counsel had made available, and the transcripts of the conversations received in evidence against the defendant. As a result, he "came to the conclusion that this patient has been possibly mentally disturbed from adolescence." (Transcript of July 30, 1975 at 315-325). He described the defendant as a "chronic schizophrenic". (Id. at 328; 365; 367).

> "If my suspicion is correct, this man has had a mental disturbance, fluctuating, and I cannot say how he was at the time during those months. ...(T)here is some degree of thinking disorder." (Id. at 337).

He described this as a "chronic problem", (Id. at 338); his diagnosis was "residual schizophrenia" (Id. at 370).

> "There are many, many cases where there is a psychotic type of process that goes up and down. I would suspect that there is a possibility that that may be the case here." (Id. at 339).

On cross-examination, the Government marked a document as its Exhibit 27 for identification, and asked Dr. Rendon if he had seen it before. The doctor replied, "No sir." The Government then identified the document to the jury as the medical records of the defendant from the West Street Federal Detention Headquarters, and questioned the doctor further to show that he had not been aware of such reports, and that his diagnosis was therefore based on an incomplete review of the patient's records.

Defense counsel then requested a side-bar conference. He moved to strike this testimony from the record and to preclude the Government from questioning the witness as to this medical report or any other such reports because the Government had failed to disclose the existence of such reports in response to the reciprocal Rule 16 motions.

> "I would like to make a motion that the U.S. be precluded from in any way going into or making

> a reference to these documents because there were motions made with respect to discovery of all medical reports and diagnoses related to the defendant. I was given everything that the Government told me they had. This was never made available to me. And now for the first time there is being shown these medical reports related to the defendant and I move for the prohibition of the Government in referring to these and that any reference to them be struck from the record.
> ...I asked the Government for all medical reports in their possession. It was represented to me that I was given everything related to the defendant. This was not given to me and not represented that it existed.
> ...I am surprised, your Honor."
> (Id. at 350-352, made part of the Appendix at 72-74).

The Court denied defense counsel's motion on the ground that these reports could have been subpoenaed.

The Government then showed the witness other medical reports and psychological tests, (Government's Exhibit 28 for identification) that were performed on the defendant at Springfield, but not made available to defense counsel, so as to again elicit the reply that the doctor had not seen these either, and therefore had based his diagnosis on incomplete data. (Id. at 353-354, made a part of Appendix at 75-76).

On its rebuttal case the Government called Dr. David Abrahamsen, a psychiatrist, as its only witness.

In its summation to the jury, the Government emphasized, repeatedly, that Dr. Rendon's diagnosis was faulty because it was incomplete, not having considered or been based on the medical reports from West Street and the medical reports and psychological tests from Springfield (Id. at 456-457; 463, made part of the Appendix at 79-82); while, on the contrary, Dr. Abrahamsen's diagnosis was based on all the available medical data. (Id. at 463, made a part of the Appendix at 82). The Government urged that the jury had a right to rely on the testimony of a psychiatrist who had "all of this available material and makes an opinion, a succinct, albeit qualified opinion." (Id.)

The jury was sent out to dinner after the Court's Charge, and began deliberations upon it's return at 8:00 P.M. Several notes sent by the jury requested the medical reports, testimony, certain other evidence and a further Charge on the definition of "knowingly" and "intentionally" (Id. at 520-521, made part of the Appendix at 58-59). At about 11:00 P.M. the jury was sequestered for the night, having failed to reach a verdict.

Deliberations continued the following day at 9:30 A.M. Not until 4:50 P.M. in the afternoon did the jury

find the defendant guilty on all counts.

On September 26, 1975 the defendant was sentenced to a term of imprisonment of seven years on each count, to run concurrently, under 18 U.S.C. §4208(a)(2), with a special parole term of ten years; the defendant to be deported upon completion of the sentence.

Point I

The Court committed reversible error by not precluding the Government from questioning Dr. Rendon about medical reports which were not provided defense counsel pursuant to the Rule 16 demand.

(A)

Pursuant to written, informal reciprocal demands made under Rule 16(a) and (c) or new Rule 16(a)(1)(D) and (b)(1)(B) of the Federal Rules of Criminal Procedure defense counsel expressly requested copies of the results or reports of all physical or mental examinations, and of scientific tests or experiments made in connection with the defendant.

As noted, the Government in response made available two reports from the Kings County Hospital Center of January

25, 1975 and February 19, 1975, two reports from the Medical Center for Federal Prisoners in Springfield, Missouri of April 17th and November 18, 1974 and the report of Dr. Abrahamsen. Defense counsel was informed that there were no other medical reports, examinations or tests pertaining to the defendant.

Defense counsel, relying upon this representation, made only these materials available to Dr. Rendon. Then, at trial, the Government marked for identification certain other medical reports and tests of the defendant from the Federal Detention Center at West Street (Exhibit 27) and from the Springfield Medical Center (Exhibit 28). The Government was permitted to identify these materials to the jury and disclose to it that documents thus relevant and indeed critical to Dr. Rendon's diagnosis were not considered by him in arriving at his conclusion.

Defense counsel was never given copies of these reports, although they were obviously in the possession of the Government, nor was their existence ever revealed, although demand was made for discovery and inspection of reports of examinations and tests pursuant to Rule 16.

It is not contested that the Government improperly questioned Dr. Rendon relative to his failure to request the

opportunity to listen to the tape recordings, since he was in possession of the transcripts of such conversations which were provided by the Government. Nor is it denied that the Government properly questioned Dr. Rendon about his failure to personally communicate with the Special Agents or with the medical authorities in Colombia, since these facts were known to defense counsel.

It is, however, argued that the Government prejudiced the defendant by misleading the defense into believing that it was in possession of all reports and results of examinations and tests performed on the defendant (indeed, it was so expressly represented), and then surprising defense counsel by using undisclosed reports to impeach the testimony of Dr. Rendon. Since the Government did not offer such reports into evidence, and since defense counsel had never seen them, there is no way of knowing whether the findings or substance of such reports would have been of benefit to the defendant. But precisely by not offering them, while disclosing their identity and eliciting the fact that Dr. Rendon had not seen or considered them in arriving at his diagnosis and conclusion, the effect was to use these documents against the defendant. Dr. Rendon's testimony - which was the most crucial in the defense of this case - was thus

weakened and clearly prejudiced by the Government's tactics.

Defense counsel had a right to rely upon the Government's representations and response to the Rule 16 motion. There was, therefore, no obligation upon the defense in light of the Government's response and under the circumstances to serve subpoenas on the Kings County Hospital Center, on the Medical Center in Springfield or on the West Street Detention Center.

To what effect and for what purpose are pre-trial discovery motions if defense counsel cannot rely upon the Government's response thereto? Should the Government be permitted to use materials not revealed to the defense in order to impeach the testimony of a witness by referring to such documents and indeed showing them to the witness and identifying them to the jury? Does the fact that the Government did not offer these documents into evidence somehow relieve it of the obligation to disclose their existence to defense counsel?

In a case such as this, where the issue of the defendant's criminal responsibility was the crux of his defense, the seriousness of the Government's tactics and their prejudicial effect upon this defense are abundantly clear. The defendant's mental responsibility for the offenses charged

was put in issue by the testimony of the defendant, Dr. Rendon, and the several exhibits submitted on behalf of the defense. Therefore, the issue of his legal sanity became an essential element of the offense to be proved by the Government beyond a reasonable doubt. When the Government failed to make medical tests bearing on this issue available to the defense, and then used such material to impeach the testimony of the defendant's principal witness on this same issue, it seriously prejudiced the defendant's right to a fair trial.

It should be noted that under the amended Rule 16, effective December 1, 1975, such reports of physical or mental examinations, and of scientific tests or experiments, "shall" be made available to the defense by the Government if they "are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial." (Emphasis added). Rule 16(a)(1)(D). The former Rule 16 permitted the inspection of such documents if they were "relevant" to the defense. Under either construction, the defendant was clearly entitled to such documents, whether or not the Government intended to offer them into evidence.

(B)

There is no requirement in Rule 16(a) that the defendant designate those materials he seeks, since frequently he will be unaware of their existence. There is a requirement, though, that such materials requested be "relevant" or "material". A general motion, substantially in the language of the rule, has been held sufficient to place on the government attorney the burden of producing the relevant materials of which he has knowledge, or could, in the exercise of due diligence, obtain knowledge. United States v. Federman, 41 F.R.D.339, 340-41 (S.D.N.Y. 1967); United States v. Acarino, 270 F.Supp. 526, 527 (E.D.N.Y. 1967).

Both Rule 16(g) and new Rule 16(c) impose a continuing obligation on a party who has already complied with a discovery order. If at any later time, prior to or at the trial, he finds additional material previously requested or ordered that is subject to discovery under the rule, he must promptly notify the other party or his attorney or the court of the existence of the additional material. This the Government failed to do.

In United States v. Kelly, 420 F.2d 26 (2d Cir. 1969) this Court applied sanctions for the failure to comply by reversing a conviction and remanding for a new trial,

where the Government offered evidence of scientific tests which were first disclosed to defendant at trial or immediately before. Pierce v. United States, 414 F.2d 163, 169 (5th Cir.), cert. denied, 396 U.S.960 (1969). The existence of Exhibits 27 and 28 was not disclosed herein until actually marked for identification at trial.

Rule 16(g) and new Rule 16(d)(2) also contain sanctions for failure to comply with Rule 16. The Court, as defense counsel requested, may prohibit the Government from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances. Rezneck, The New Federal Rules of Criminal Procedure, 54 Geo. L.J. 1276, 1293-1294 (1966). Obviously, a preclusion order against the Government would have been ineffective if it went only so far as prohibiting the introduction into evidence of the material. For here, it was not the Government's intent to introduce the material, but rather only to use it to impeach the testimony of the defendant's witness. It was therefore both necessary and appropriate that the Court prohibit the Government from questioning the witness with regard to such materials or otherwise bringing them to the attention of the jury. Good v. United States, 410 F.2d 1217, rehearing denied, 415 F.2d 771 (5th Cir. 1969), cert.

denied, 397 U.S. 1002 (1970); United States v. Padrone, 406 F.2d 560 (2d Cir. 1969).

The prejudicial effect to the defendant's substantial rights from the failure to make this material available to the defense and thus to Dr. Rendon, coupled with the absence of any Government assertion of exclusable neglect in the failure to comply with the letter and spirit of Rule 16, demand reversal of the conviction. Having placed in issue the defendant's criminal responsibility at the time of the alleged acts, it was then incumbent upon the Government to prove this issue beyond a reasonable doubt. The substantial prejudice to the defendant which resulted by the use of these undisclosed reports to impeach the testimony of his psychiatrist's testimony, is thus clear.

5. Conclusion

For the reasons stated, it is respectfully submitted that the verdict of guilty on the instant indictment be set aside, and the case remanded for a new trial.

Respectfully submitted,

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Appellant Pineros